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October 3, 2017

VIA ELECTRONIC FILING

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

**Re: Accelerating Wireline Broadband Deployment (WC Docket No. 17-84);
Notice of *Ex Parte* Presentation**

Dear Ms. Dortch:

On October 2, 2017, Scott Patrick and the undersigned of Baker & Hostetler, LLP, counsel for the National Railroad Passenger Corporation (Amtrak), met with Commissioner Michael O'Rielly and Amy Bender, Wireline Legal Advisor to Commissioner O'Rielly, and met separately with Commissioner Brendan Carr and Nathan Eagan, Wireline Legal Advisor to Commissioner Carr. Joining us in these meetings were Vincent Brotski, Amtrak Senior Associate General Counsel; Cindy Durst, Amtrak Director, Real Estate, Northeast Corridor Infrastructure; and David Flinkstrom, Amtrak Consultant, Senior Communications Engineer.

Amtrak discussed in these meetings why establishing any pole attachment information collection or disclosure requirements for railroads would be both inappropriate and counterproductive. Consistent with the attached presentation, Amtrak explained that such requirements would not advance the Commission's broadband deployment goals because railroads have an insignificant role in the last-mile distribution of broadband services over public rights-of-way (ROW). Amtrak observed that imposing such obligations on railroads would instead impair free market negotiations for use of the limited railroad ROW that is available for third-party communications purposes, and would inflict unnecessary and significant costs and burdens on railroads.

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Federal Communications Commission
October 3, 2017
Page 2

This notice is filed pursuant to Section 1.1206(b) of the Commission's rules. Kindly contact me if any questions arise regarding this filing.

Sincerely,

A handwritten signature in blue ink, appearing to read "G. Lutzker", with a stylized flourish at the end.

Gary S. Lutzker
Counsel to Amtrak

Attachment

cc (via e-mail): Commissioner Brendan Carr
Commissioner Michael O'Rielly
Ms. Amy Bender
Mr. Nathan Eagan

**NATIONAL RAILROAD PASSENGER CORPORATION (“AMTRAK”)
ACCELERATING WIRELINE BROADBAND DEPLOYMENT**

Accelerating Wireline Broadband Deployment, WC Docket No. 17-84, *Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment*, FCC 17-37 (rel. Apr. 21, 2017) (“NPRM”).

Issue:

Paragraph 30 of the NPRM seeks comment on potential actions “the Commission might be able to undertake to speed deployment of next generation networks by facilitating access to infrastructure owned by entities not subject to Section 224” (*i.e.*, railroads, electric cooperatives, and governmentally owned entities). The NPRM specifically asks:

- i. How the Commission can “encourage or facilitate access to information about pole attachment rates and costs with respect to these entities, and what are the benefits and drawbacks of these potential steps?”; and
- ii. Whether access to such information would “benefit potential attachers to non-Commission-regulated poles by providing data that would be useful in contractual negotiations” and whether this would “facilitate broadband deployment?”

Short Answer:

Requiring railroads to collect and disclose information regarding pole attachment rates and costs would do nothing to advance broadband deployment because unlike co-ops and local governments, railroads are not significantly involved in the last mile distribution of broadband services over public rights-of-way (“ROW”). Imposing such obligations on railroads would instead impair a functioning free market for third party telecommunications uses of limited railroad ROW and inflict unnecessary costs and burdens on railroads.

Discussion: Railroads Have No Significant Role In The Last Mile Distribution Of Broadband Services, And Subjecting Them To Information Collection And Disclosure Requirements Would Not Advance Broadband Deployment.

- **Interfering in private, free-market negotiations would retard rather than advance broadband deployment.** Amtrak and its counter-parties establish the rates, terms, and conditions of their telecommunications ROW leases in private, free-market negotiations that account for the unique attributes of railroad operations and the unique needs of the lessees. Mandating the disclosure of such rates, terms, and conditions would not advance broadband deployment, but would constitute unwarranted government interference in a free-market negotiation for the benefit of one party to those negotiations. This likely would impede rather than accelerate the deployment of next generation networks.
 - The Commission has declined to require the collection and disclosure of such proprietary information in, for example, broadcaster-cable television retransmission consent negotiations even where, unlike here, the parties and the negotiations are already subject to Commission regulations. Even if collected, such confidential commercial information would in any case be protected from disclosure under FOIA exemption 4, 5 U.S.C. § 552(b)(4).
- **The record in this proceeding confirms the absence of any basis for sweeping railroads into a new information collection and disclosure requirement.** The comments and *ex parte* notices filed in this proceeding regarding the issues raised in paragraph 30 of the NPRM demonstrate that the conduct of electric cooperatives and governmental entities rather than railroads is at issue. No comments or reply comments have suggested that railroads should be subject to any form of regulation or information collection in this proceeding and none suggests any benefit to broadband deployment from imposing such requirements on railroads.¹ Instead, the comments and reply comments in the record focus on electric cooperatives and governmental entities that control public ROW used for last-mile distribution rather than the use of railroad ROW for the uninterrupted, long-distance fiber backbones that support broadband services.²
 - The initial ACA *ex parte* that led to adding paragraph 30 to the final NPRM briefly alluded to issues associated with railroad crossings, but admitted that this factor ultimately did not impede broadband deployment given the availability of alternate routes.³ Moreover, with the exception of this passing reference to railroads in its initial

¹ Amtrak has found to date only two direct references to regulating railroad ROW for pole attachment purposes (other than in the reply comments of the Association of American Railroads). Moreover, those references either simply noted the existence of at least one state's limited jurisdiction in the context of federal preemption, or advocated for establishing a "model code for state legislation" by initiating a new proceeding, rather than for establishing any kind of requirements for railroads here. Minnesota Telecom Alliance Comments, WC Docket No. 17-84, at 3-5 (June 15, 2017); NTCA Comments, WC Docket No. 17-84, at 16-17 (June 15, 2017).

² A recent GAO Report also confirms railroads are conspicuously absent from the entities identified as barriers to broadband deployment. See United States Government Accountability Office Report to the Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, *BROADBAND Additional Stakeholder Input Could Inform FCC Actions to Promote Competition*, GAO-17-142 (Sept. 19, 2017).

³ Letter from Thomas Cohen, Counsel for ACA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 16-421, et al., at 3-4 (filed April 3, 2017).

ex parte submitted prior to adoption of the NPRM, neither ACA's comments or reply comments in this proceeding even mention railroads or the issues raised in paragraph 30.

• **The significant burdens associated with collection and disclosure requirements for railroads outweigh their non-existent benefits.**

- Unlike electric utilities and telephone companies that account for capital costs associated with pole attachments pursuant to either detailed Federal Energy Regulatory Commission ("FERC")⁴ or FCC ARMIS regulations,⁵ Amtrak and other railroads are not subject to these regulations. Therefore, realistic comparisons between railroads and other regulated and unregulated entities regarding the costs and rates for pole attachments are essentially impossible. Such information in any event would provide no useful information for potential attachers because they could not accurately compare it to the costs and rates of other entities that control public ROW.
- Mandatory disclosure of rates and costs is particularly inappropriate for railroad ROW, where circumstances are fundamentally different than in last-mile distribution systems, safety concerns take on added importance, and non-discriminatory access as envisioned under Section 224 is both impossible and prohibited by the statute.
- The burden on Amtrak of collecting cost information is insurmountable as a practical matter because the parties installing facilities on Amtrak's property are responsible for all associated capital costs and Amtrak has no access to such third-party capital cost information. Moreover, imposing information collection requirements on Amtrak could do nothing to accelerate broadband deployment in the last mile of the distribution system. The burdens consequently far outweigh the non-existent benefits in this case.

• **The predicate for Congress's determination to exempt railroads from pole attachment regulation remains accurate.** Congress exempted railroads from pole attachment regulation⁶ because it recognized that railroads have an "insignificant role" in cable plant distribution,⁷ which is concentrated in the last mile. Even when railroad ROW is available for non-railroad telecommunications purposes, its use often is for fiber network backbone rather than last-mile broadband deployment.

- Unlike railroads, cooperatives and governmental entities have become extensively involved in the last mile distribution of broadband facilities and services⁸ since adoption of the Pole Attachment Act in 1977. Amtrak takes no position on the possible establishment of new information collection and disclosure requirements for

⁴ See 18 C.F.R. Part 101.

⁵ See 47 C.F.R. Part 32.

⁶ 47 U.S.C. § 224(a)(1).

⁷ S. Rep. No. 95-580, at 19 (1977), reprinted in 1978 U.S.C.C.A.N. 109, 127.

⁸ See, e.g., City of Wilson, North Carolina Petition for Preemption of North Carolina General Statute Sections 160A-340 *et seq.*; Electric Power Board of Chattanooga, Tennessee Petition for Preemption of a Portion of Tennessee Code Annotated Section 7-52-601, *Memorandum Opinion and Order*, 30 FCC Rcd 2408 (2015), *reversed sub nom. State of Tennessee; State of North Carolina v. FCC*, 832 F.3d 597 (6th Cir. 2016).

- cooperatives and governmental entities, but observes that the Commission is free to reach separate determinations for each of these entities.
- Amtrak's ROW is reserved primarily for occupancies that support railroad operations and requirements, which in the case of telecommunications includes functions such as signaling and safety communications. Under the relatively limited circumstances where substantial longitudinal space in Amtrak's ROW is available for third-party telecommunications uses consistent with railroad operations, however, these uses support the Commission's goals of accelerating the deployment of advanced broadband networks and faster broadband transmission rates. In contrast to use of the public ROW for last-mile distribution, such longitudinal use of Amtrak's ROW allows for uninterrupted, long-distance fiber backbones that can transmit ultrahigh-speed data and reduce the latency associated with last-mile facilities.
 - **The Commission should avoid potential conflicts with other federal statutes and agencies that either govern railroad operations or have primary jurisdiction over railroads.** Since at least 1875, Congress has separately addressed many railroad ROW issues,⁹ which further explains the basis for the railroad exemption in Section 224. In Amtrak's case, Congress explicitly established the goal of minimizing government subsidies by maximizing the cost-effective use of Amtrak's facilities and real property.¹⁰ Subjecting Amtrak to additional FCC information collection and disclosure requirements would undermine that congressional directive. Moreover, railroads already are subject to extensive regulation by other governmental entities, including among others the Surface Transportation Board, the Federal Railroad Administration, and the Department of Transportation.¹¹ In an analogous context, Chairman Pai has recognized the value of a "consistent and comprehensive" regulatory framework and the dangers of infringing upon the jurisdiction of other federal agencies.¹²

⁹ See, e.g., General Railroad Right-of Way Act of Mar. 3, 1875, ch. 152, 18 Stat. 482. Congress most recently addressed railroad ROW issues in the Fixing America's Surface Transportation Act (the FAST Act), Pub. L. No. 114-94, 129 Stat. 1312 (2015), and the Passenger Rail Investment and Improvement Act of 2008 (PRIAA), Pub. L. No. 110-432, 122 Stat. 4848 (2008).

¹⁰ 49 U.S.C. § 24101(c)(12)-(d). Federal courts have recognized the importance of Amtrak's meeting these statutory goals. See, e.g., *National Railroad Passenger Corp. (Amtrak) v. 3.44 Acres More or Less of Land and Building*, Case No. 15-cv-01088, slip op. at 9 (DDC, Sept. 20, 2017).

¹¹ See Association of American Railroad Reply Comments, WC Docket No. 17-84, at 3, 21-24 (July 17, 2017) ("The ICC Termination Act ("ICTTA") vests exclusive jurisdiction in the STB over rail transportation and gives the STB broad authority over ground, property, and facilities necessary for rail transportation. Just as the STB exercises jurisdiction over rail transportation, the Federal Railroad Safety Act ("FRSA") gives the DOT and the FRA jurisdiction over "every area of railroad safety." (footnotes omitted) (citing 49 U.S.C. §§ 1301-1306, 10101, and 20103(a)).

¹² See Statement of FCC Chairman Ajit Pai on Ninth Circuit Decision to Rehear *FTC v. AT&T* Case (May 9, 2017); Joint Statement of FCC Chairman Ajit Pai and Acting FTC Chairman Maureen K. Ohlhausen on Protecting Americans' Online Privacy (March 1, 2017).